should be considered on this application, we desire to set out what we think is correct, and briefly point out the fallacies in the brief and statement in support of the petition.

The Facts.

Under this heading the Solicitor General's statement is reasonably accurate as far as it goes. It is in error as to the date the allotment was approved. The correct date is September 16, 1891, instead of September 6, 1891, and the conveyance involved is from an heir instead of the allottee. Moreover, the schedule was deposited with the Commissioner of the General Land Office on September 16, 1891, and not on February 6, 1892; but the patent was not issued until the last date named. And what we object to particularly is that the President extended the trust period for 10 years upon the land involved in this suit by his order of November 24, 1916. We are unwilling to admit that he even attempted to do so.

Wherefore, we think the order relied on should be set out here and it follows in so far as it affects absentee Shawnee lands.

The "Facts" should likewise show that the value of the matter in controversy does not exceed $100 and to be accurate is $90.

With the statement of facts amended as we have suggested there can be no grounds for objection to it.

Question Presented.

We emphatically say the question presented is not "Whether the twenty-five-year trust period provided for in the General Allotment Act of February 8, 1887 (24 Stat. 389), begins to run from the date of the issuance of the so-called trust patent or from the date of the approval of the allotment by the Secretary of the Interior"; but the real question presented is, whether Suda Reynolds has an undivided one-eleventh interest in the land mentioned in this case, worth at most $90.00; and the secondary question is, whether the lands involved in this controversy were held in trust 25 years from the date the allotment was confirmed and approved, or 25 years from the date of the instrument *evidencing the title of the allottee;* because the allotment involved was not made under the Act of 1887, *supra,* strictly speaking; but under and by virtue of the provisions of Article II of the Agreement of 1891 with the Absentee Shawnee Indians. The pertinent part thereof reading as follows:

> "Whereas, certain allotments of land have been heretofore made, and are now being made to said Absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress entitled, 'An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the In-

dians and for other purposes,' approved February 8, 1887, and according to said instructions, other allotments, are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, locations and area, as those heretofore made, *and when made shall be confirmed. When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular,* in the same manner and to the extent provided for in the above-mentioned Act of Congress."

The Act of 1887, it is true, is the basic act; but this Article II is important because it would be impossible to state more clearly or forcibly that title passed with the approval of the allotment. It is true that the Circuit Court of Appeals construed the Act of 1887 alone, and we think construed it correctly; but if this case is to be reviewed the Act of 1891 must be considered.

Reasons for Allowance of Writ.

The Solicitor General as reason for allowance of the writ says that the decision of the Circuit Court of Appeals was by a divided court, which is true as far as it goes; but it did not divide on the question as to when the trust began to run. They all agreed

that the trust period began with the approval of the allotment and that it ended on Sept. 16, 1916; but one of the learned judges expressed the opinion that the President could reimpose the trust, a proposition that was not contended for below, and not now suggested by the petitioner. So there was no division in the Circuit Court of Appeals on any question involved in this application.

Likewise it is asserted that "There are other cases pending in the District Court involving this question" by the Solicitor General. We regret that we are compelled to traverse this statement. There are no cases pending in the District Court calling for a determination of when the trust period expired as to allotments made to Citizen Pottawatomies and Absentee Shawnees with the sole exception of the case of the *United States* v. *C. J. Becker*. This last-named case will be controlled by the rule in the case at bar if it is adverse to the Government; but not, if the Government prevails, because the case at bar involves inherited lands, while the *Becker* case is an original allotment; the case at bar deals with lands that may be covered by the executive order of November 24, 1916, *supra*, while the *Becker* case concerns lands which the order of November 24, 1916, declared to be free from the trust and on which an attempt was made to reimpose the trust by and order issued in January, 1917. So that if the Government wins this case Becker must still litigate his title.

It is further urged that the case is of general and public importance, on the strength of a letter from the Assistant Commissioner of Indian Affairs.

The Assistant Commissioner says that several thousand Indians are affected by the decision of the court below. With this we dissent.

The only people allotted under the Act of 1891, *supra,* were the Citizen Pottawatomies and Absentee Shawnees. The total number of Pottawatomies being 1,489 and Shawnees being 563. However 776 allotments were made under the Act of 1872 but these were not trust allotments but base fees, inalienable without approval by the President and for which no patent of any kind has ever been issued. The annual report of the Superintendent of the Shawnee Indian School, in charge of the Absentee Shawnees and Citizen Pottawatomies, dated June 30, 1916, on file in the Indian Office, shows that there were 190 Citizen Pottawatomies who had not received patents in fee for any part of their allotments and 60 who still held a part of their allotments under trust patent or a total of 250. Of these only 11 were fullbloods.

The same report shows there were 200 Shawnees who had not received patents in fee to any part of their allotments and 33 who had received patents in fee to a part of their allotments or a total of 233 Absentee Shawnees who then had lands that had not wholly passed from governmental control, or a total

of both tribes of 483. A very small part of these were fullbloods and as the Superintendent says, these allottees "were scattered all over the country pursuing various occupations of honor and profit." What part of these were allottees under the Act of 1872 or their heirs is not disclosed and there is no information to be had on this point, that we are aware of.

We have not been able to see the reports for 1917 and 1918. But under the Acts of August 15, 1894 (28 Stat. 286); May 31, 1900 (31 Stat. 221) and May 27, 1902 (32 Stat. 245-275) these Indians had the right to alienate, both original allottees and heirs, and they have been steadily disposing of their lands. Moreover the executive order of November 24, 1916, gave 14 Shawnees and 80 Pottawatomies patents in fee to their allotments, so that it is safe to say that of the 483 persons whose land were under governmental control in 1916, there are now less than 300. And these are not Indians, and are scattered to the four winds, a great part of them have never been within the State of Oklahoma. Never saw their allotments, and the lands are not now, and have never been utilized for any purpose. Moreover many of these do not hold allotments under the trust feature and many are not allottees but heirs.

The substance of the Assistant Commissioner's letter is that the judgment, will, pleasure or conve-

nience of the department should prevail rather than the plain letter of the law.

It is entirely safe to say that Suda Reynolds would never have questioned the correctness of the District Court's decision knowing that she was bound for the costs and expense of an appeal to the Circuit Court of Appeals, win or lose, except for the threat of a criminal prosecution under the provisions of Section 5 of the Act of June 25, 1910 (36 Stat. 855-856); much less incur the financial burden the proceedings here entails.

We therefore respectfully urge that none of the reasons assigned exist—

The case is too insignificant to take the time of the court.

There was no division of opinion in the court below on the question urged.

There are no other cases pending involving the question in this case and the widest view of the question as presented by the petition does not affect any great number of people and therefore it is not of general and public importance.

ANSWER TO THE BRIEF IN SUPPORT OF THE PETITION.

In his brief the Solicitor General lays down two propositions, the first is as follows:

"The decision of the Circuit Court of Appeals reverses the contemporaneous interpretation put upon the Act of 1887 by the executive department in issuing trust patents thereunder and since uniformly adhered to."

The sole s u p p o r t for this proposition, that is cited, is the opinion of the First Assistant Secretary of the Interior in 38 L. D. 559, 561, involving allotments made to Klamath Indians.

This decision was rendered in January, 1910, more than 23 years after the passage of the Act of 1887; so that it seems peculiar to urge it as authority for the proposition contended for. If the department had always held that the trust period began to run with the issuance of the trust patent it is not clear why it should have to hold it anew. Moreover the opinion does not refer to any prior holding in harmony with the view now urged. It expressly refers to a prior decision to the contrary, and says that the rule in the former opinion was right and that the two cases are to be distinguished. And that is cor-

rect. The question in the *Klamath* case was whether the trust patent should be issued under the fifth section of the Act of 1887 or under the Act of May 8, 1906 (34 Stat. 182); while the question in the case mentioned in the *Klamath* decision, was when did the trust period begin to run where no patent was ever issued. The Assistant Secretary uses the following language in closing the opinion cited by the Solicitor General:

> "June 26, 1909, the department rendered decision in the matter of disposal of the residue lands of the Omaha Indians in Nebraska under the Special Acts of August 7, 1882 (22 Stat. 341) and March 3, 1893 (27 Stat. 612, 630). The first-named Act provided, after individual allotments were completed and trust patents issued thereon, for issuance of trust patent to the tribe covering the residue lands in the same form prescribed by Section 5 of the General Act of 1887. Allotments were 'to be made from such residue lands to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of the Act touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common.' The trust patent was not issued to the tribe at the time it was due, but it was never-

theless held in said decision that the trust period expired twenty-five years from the date on which said patent became due." 38 L. D. 559, 561.

The Omaha decision is not published and the *Klamath* decision is the only one that is, and it was rendered in 1910.

The Omaha Acts construed, read as follows:

"*Sec. 6.* That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contracts shall be absolutely null and void. *Provided,* that the law of descent and partition in force in said state shall apply thereto after patents therefor have been executed and delivered."

Sec. 7 is the citizenship section.

"*Sec. 8.* That the residue of lands lying east of said right-of-way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this Act provided, shall be patented to the said Omaha Tribe of Indians which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of said Omaha Tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha Tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever. *Provided,* that from the residue lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity, and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this Act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common." (22 Stat. 341.)

The allotments provided for in Section 5 were made and trust patents issued as usual, that is sometime after the schedule was approved and the patents ordered issued.

The patent to the tribe for residue lands was not issued and allotments to children were not made as provided in Section 8. Afterwards further legislation was enacted, to-wit:

> "That the Act of Congress approved August seventh, eighteen hundred and eighty-two, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha Tribe of Indians in the State of Nebraska, and for other purposes' be, and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said Act, and now living, etc. * * * *Provided,* that the allotments so made shall be subject to the same conditions, restrictions, and limitations, provided for in Sections six, seven and eight of said Act touching allotments and patents to allottees therein mentioned."

These last allotments were made and it became necessary to prepare a special form of patent for it was evident that the trust period would not run for 25 years unless the settled construction and interpretation of the language declaring the trust could not be avoided. Thus the question when the trust period began to run became instantly important. The Secretary held unequivocally that the tribal trust period

began, *eo instanti,* with the individual trust created by the original allotment, and that both began with the approval of the schedule, and not 25 years from the date of the trust patents issued to the allottees.

This is not all, for the President of the United States is a part of the executive department, to say the least, and the President said, as to the very land involved, in his proclamation of Sept. 18, 1891, opening the ceded lands to settlement that:

> "Whereas, allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively, * * * " (27 Stat. 980-2.)

This proclamation was prepared, as are all such proclamations, by the Interior Department and by the Indian Bureau and the Land Office thereof. It bears Secretary Noble's signature and is just two days after the approval of the schedule. The President, the Secretary, the Commissioners of both the Land Office and the Indian Bureau, as well as every person connected therewith, well knew that the physical act of preparing the patents and recording the same, had not been done and could not possibly have been done; but they all, in common with every person

who has had occasion to come in contact with the matter of allotments, knew that as a matter of law the order approving the allotment schedule and directing the patent to issue was equivalent to the issue; that no matter when actually issued the patent related back to the date of approval, and as a matter of law the trust period began to run from the approval.

Moreover, the Secretary of the Interior has for many years published an annual report which contains a tabulated statement showing when the allotments to various tribes were made and in each, including 1917, it is stated that these allotments were made in 1891.

So that the proposition falls on the record because the "contemporaneous interpretation" put on the Act of 1887 by the Executive Department is that of the Circuit Court of Appeals.

The second proposition is that:

"The uniform interpretation by the Interior Department is clearly right."

This proposition like the first is based on false premises. For more than 23 years after the passage of the Act of 1887 the interpretation of the department was that adopted by the Circuit Court of Appeals.

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The argument says that the provision of the act requiring patents to be issued declaring the trust is not self-executing and prior to the actual issuance of the trust patent there is no declaration of trust. That the approval of the schedule is not a declaration that the United States will hold the title for the benefit of the allottee, for the Secretary is not empowered to issue the patent or declare the trust. That Section 450 of the Revised Statutes contains the authority to issue the patent. That Congress provided the terms of the trust and left it to the President to declare it.

This is novel doctrine for the Attorney Generals' office. No authority is cited and if the opinions of Attorney General Garland and his successors for many years are consulted it will be discovered that the Attorney General has uniformly held that there is no authority for the issuance of a patent to an Indian allotment outside of the Act authorizing the allotment. Witness the allotments to Citizen Pottawatomie and Absentee Shawnee under the Act May 1, 1873, the 776 mentioned *supra* and to whom no patent has ever issued and none can be until authority is given by Congress or the Attorney General changes this view. Moreover the statute reads, "He (the Secretary of the Interior) shall cause patents to issue, etc."

The presidential power is covered by the first section of the Act of 1887 and he determines when allotments are to be made and the 5th section places the duty and authority to issue patent in the Secretary alone. The correct statement is that Congress declared the trust to vest on the happening of a contingency, to-wit: the approval of the allotment.

It is further argued that the Circuit Court of Appeals relied on two propositions in arriving at the conclusion reached: *First,* That the right of the allottee in the land became vested upon the approval of her allotment, and the issuance of a patent therefor was merely a ministerial act; and *second,* that whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so.

The first is dismissed with the assertion that it is "unimportant" because the shortening or extension of the trust period does not affect the vested right of the allottee. Who then is affected? It is true that Congress has the power to extend or provide for the ending of the trust and no right is granted by allotment that impairs the constitutional power of Congress with respect to Indian lands; but that it does not affect the vested right of the allottee under the Act of 1887 to hold that the beginning of the term of the trust is dependent on the convenience

of the clerks of the land office is not supported by authority or reason.

It is also suggested that because the law of descent and distribution does not apply until the trust patent issues that an inherited estate is not conferred merely by approval of allotment. The intent can be clearly seen by the act. The heirs inherit before issuance but after patent issued all persons entitled under the statutes of distribution take, including estate of curtesy and dower. And it is true that literally thousands of allotments have been sold by heirs and the deeds approved by the department where the allottee died before patent; probably one-fifth of the Yanktonai Sioux allotments were so sold. So that we cannot see the force of this argument. And finally the case of the *United States* v. *Rowell*, 243 U. S. 464 is said to be directly in point. Perhaps so, but not in support of the contention of petitioner. The *Rowell* case is a strong case in support of the rule that the Supreme Court will give effect to the intention of Congress.

There is another rule that the decision of the Supreme Court establishes beyond all doubt, and that is, where agreements have been made with Indians these will be interpreted to effectuate the understanding of the dependent people parties thereto. Can it be honestly urged that the Stella Washington and other Absentee Shawnees had any intimation that

the date when they would own their lands in fee simple was dependent on the ability of the clerical force of the Land office or Indian Bureau? Or as put by the Acting Commissioner of Indian Affairs, in his letter quoted in the petitioner's brief, on "various reasons," or did they understand that the agreement meant what it said and that

> "When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned Act of Congress." (Act of 1887.)

We think there can be no doubt about the meaning of the Agreement or the Act, much less the intention of Congress.

The second proposition that the Circuit Court of Appeals relied on to-wit: that where "Congress desires to make the trust period begin with the date of patent or certificate of allotment, it expressly says so," is disposed of by the assertion that the statutes cited by the court "are not statutes relating to allotments to be held in trust for the Indians under trust patents."

In this assertion the petitioner again is unfortunate. The opinion of the Circuit Court of Appeals cites the Act of March 2, 1889 (25 Stats. 1013) covering allotments to P e o r i a s, Miamis and others.

These Indians were expressly excluded from the operation of the Act of 1887 by the 8th Section; but the Act of March 2, 1889, expressly extended the provisions of the Act of 1887 over them except the 6th or Citizenship Section of the Act of 1887, and the allotment patent issued was a trust patent exactly like the one issued except the provision as to alienation, etc., recites that period begins with the date of the patent.

The Act of March 3, 1885 (23 Stat. 340) covers allotments on the Umatilla Reservation and the trust period feature is in the identical language of the 5th section of the Act of 1887, but further along in Section 2 of the Act the following appears:

> "And if any conveyance is made of the lands set apart and allotted as herein provided, or any contracts made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract or lien shall be absolutely null and void."

The context shows that the patent here referred to is the fee simple patent. Hence we say that the petitioner's assertion is at least unfortunate. And the Circuit Court of Appeals was right.

When Congress desired the date of the trust patent to govern it has so said.

Conclusion.

The writ should be denied:

1. Because the matter involved aside from costs is insignificant.
2. Because no question of public and general interest is involved.
3. Because the decision of the Circuit Court of Appeals is right and the rights of the allottees, the right of heirs, and of the state to tax the land cannot be made contingent on the "various reasons" of the Indian Bureau.

Respectfully submitted,

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Sept., 1918.